SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 418.

ALANSON W. BEARD, COLLECTOR OF CUSTOMS, PLAINTIFF IN ERROR,

vs.

THOMAS C. PORTER, W. H. CADES, AND S. H. AUSTIN, LATE COPARTNERS, DOING BUSINESS UNDER THE FIRM-NAME OF CUSHING, PORTER & CADES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Thomas C. Porter, of Framingham, W. H. Cades, of Boston, and S. H. Austin, of Grantville, in said district, late copartners under the style of Cushing, Porter & Cades, having a usual place of business at said Boston, plaintiffs, and Alanson W. Beard, collector of the customs for the revenue district of Boston and Charlestown, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twentieth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

LE BARON B. COLT,
Circuit Judge.

2 CIRCUIT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court, this thirtieth day of September, A. D. 1884.

[SEAL.] JOHN G. STETSON,
Clerk.

3 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Monday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-three, before the honorable John Lowell, circuit judge, Thomas C. Porter, of Framingham, W. H. Cades, of Boston, and S. H. Austin, of Grantville, all in said district, late copartners under the style of Cushing, Porter & Cades, having a usual place of business at said Boston, plaintiffs, v. Alanson W. Beard, collector
4 of the customs for the revenue district of Boston and Charlestown, defendant, in an action of contract.

1ST COUNT.

And the plaintiffs say the defendant owes them three thousand one hundred and thirty $\frac{05}{100}$ dollars, according to the account hereto annexed.

ACCOUNT ANNEXED.

BOSTON, *Apr'l* 21, 1882.

Alanson W. Beard, collector, &c., to Cushing, Porter & Cades, Dr.

(1)	To excess of duty exacted on 2 cases lutecienne P., 1 case rocceline, 2 cases orange No. 2, 1 case violet Hoff. B., ex Parthia, May 6, 1878	189 90
(2)	" excess of duty exacted on 4 cases blue D., 4 cases orange No. 2, 6 cases saf'ronine J., 1 case orange No. 1, 4 cases nich. blue, 5 B. V., ex Atlas, May 29, '78.....	613 10
(3)	" excess of duty exacted on 2 cases Vert. 3 J., 6 cases lutecienne J., 4 cases orange dye No. 2, 1 case orange dye No. 4, 2 cases brown No. 1, ex Batavia, May 27, 1878	949 35
	(4) To excess of duty exacted on 2 cases brown dye
5 No. 1, 1 case orange dye No. 2, 2 cases rocceline dye, ex Siberia, June 5th, 1878	246 20
(5)	To excess of duty exacted on 1 case rocelline, ex Batavia, July 1, 1878.....	62 60
(6)	" excess of duty exacted on 2 cases blue B. S., 1 case nich. blue B., 1 case nich. blue G. A., 1 case Eosine V. E., 2 cases lutecienne J., ex Batavia, Aug. 5, 1878...	229 05
(7)	" excess of duty exacted on 2 cases fuchsine B., 2 cases lutecienne J. E., 2 cases rocceline, 6 cases orange No. 2, 2 cases brown No. 1, 2 cases french red, ex Siberia, Sept. 17, 1878	839 85
		3,130 05

SECOND COUNT.

And also for that, on the day of the *purchase* of this writ, the said defendant, being indebted to the plaintiffs in the sum of three thousand one hundred & thirty $\frac{05}{100}$ dollars, demanded, exacted, and received of the

plaintiff by the defendants, then and now collector of the customs for the revenue district of Boston and Charlestown, under color of a law of the United States for the collection of duties on imports, and by the
6 plaintiff paid under protest, and before that time had and received by the defendant to the plaintiffs' use, in consideration thereof promised to pay the plaintiffs when he should be thereto afterwards requested; yet said defendant has not paid the same or any part thereof, though thereto often requested, to the damage of the said plaintiffs, as they say, the sum of eight thousand dollars.

The writ in this cause is dated the twenty-first day of April, A. D. 1882, and was duly entered at the May term of this court, A. D. 1882, when and where the parties appeared by their respective attorneys.

On the eighteenth day of July the following answer was filed:

And now comes the defendant, and for answer to plaintiffs' writ and declaration, denies each and every allegation thereof.

This cause was thence continued from term to term to the May term, A. D. 1883, when on the fifteenth day of September the following amendment to declaration was filed:

7 Now come the plaintiffs in the above-entitled cause and move to amend their declaration in said cause by adding the following count:

FOURTH COUNT.

And the plaintiffs further say that on the several respective dates, and by the vessels named in the account annexed in the first count of said declaration, they imported and entered at the custom-house in said Boston the goods described in the several items of said account annexed, and the defendant duly liquidated the duties on said goods, and the plaintiffs paid the same, and the said defendant then and there delivered to the plaintiffs all of the said goods.

And the plaintiffs say that long afterwards, and after the lapse of more than one year from said respective dates of entry, the defendant made a new liquidation and settlement of duties upon said goods entered as aforesaid, and demanded of the plaintiffs the full sum of three thousand thirty dollars and five cents as additional duties upon said goods so entered as aforesaid. And the plaintiffs say that they protested against
8 such second liquidation and settlement of duties, and protested against the payment of said sum, and alleged in said protest, and now allege, that said second liquidation was made after the payment of the duties as first ascertained, and after the goods had been delivered to the plaintiffs, and more than one year after said several dates of entry, and the same was and is illegal and void. Plaintiffs appealed to the Secretary of the Treasury, who decided thereon, affirming the action of the defendant.

And the plaintiffs further say that they denied by said protest and appeal the right of the Government and of this defendant to make such second liquidation and demand, and doubts having arisen as to the right of the plaintiffs to recover back the same if paid, should the defendant contest the same upon the ground that such payment was voluntary, the

plaintiffs, by their attorney, addressed a letter to the Secretary of the Treasury of the U. S., a copy of which is hereto annexed, marked A, and received in reply thereto a letter from said Secretary, a copy of
9 which is hereto annexed, marked B, and said Secretary also addressed a letter to the U. S. attorney for said district, a copy whereof is hereto annexed, marked C, which was exhibited to the plaintiffs' attorney before the payment by the plaintiffs to defendant of the sum demanded upon said second liquidation. And the plaintiffs say that, relying upon the said agreement and assurance of the Secretary of the Treasury that the question of voluntary payment should not be raised or set up in any manner as a defence to a suit by the plaintiffs to recover back said sum, the plaintiffs were induced to and did pay the said defendant, under protest and appeal, the said sum of three thousand thirty dollars and five cents ($3,030.05) illegally ascertained and demanded as aforesaid, the same being the full sum demanded by the defendant, and the defendant now owes the plaintiffs the said sum, with interest thereon.

CHAS. LEVI WOODBURY,
Att'y for Plaintiffs.

A.

BOSTON, *Feb.* 11, 1883.

10 SIR: Respectfully referring to the reliquidation by the collector here of certain entries of aniline colors by Messrs. Cushing, Porter and Cades, and to the correspondence heretofore had with your Department in relation thereto, I have the honor to state, in behalf of Messrs. Cushing, Porter and Cades, that the collector has made demands for further duties upon what are designated as class 3 entries; that long before the liquidation upon which these demands are made the goods had been withdrawn for consumption and duties paid; that owing to this latter fact Messrs. Cushing, Porter and Cades are in doubt whether or not if they should now pay these demands and cause suit to be instituted against the collector for the recovery thereof, it might be pleaded that the action could not be maintained upon the ground of its being a voluntary payment.

Under these circumstances I have the honor to ask, in behalf of Messrs. C., P. and C., that the United States attorney here may be instructed
11 that in case of such payment and suit the question of voluntary payment shall not be set up at the trial thereof.

Yours, very respectfully,

——— ———.

To Hon. CHAS. J. FOLGER,
Secretary of the Treasury, Washington, D. C.

B.

2594d] TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., Feb. 14th, '82.

J. P. TUCKER, Esq.,
Boston, Mass.:

SIR: In reply to your letter dated the 11th instant, you are informed that this Department has advised the U. S. district attorney at Boston that

it will agree not to plead voluntary payment of any additional duties which may be paid by Messrs. Cushing, Porter and Cades to the collector of customs at Boston, on the entries of aniline dyes and colors heretofore made, to which you refer.

Very respectfully,

H. F. FRENCH,
Assistant Secretary.

(No encl.)

12 C.

2594d] TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., February 14, 1882.

Hon. GEORGE P. SANGER,
U. S. District Attorney, Boston, Mass.:

SIR: I transmit herewith a copy of a letter dated the 11th instant, from J. P. Tucker, attorney for Messrs. Cushing, Porter and Cades, in which he states that the collector of customs at Boston has made demands upon that firm for further duties upon what are designated as class 3 entries, understood to cover importations of iron and aniline dyes and colors.

It appears that the goods have been withdrawn for consumption with payment of duties, and that the firm is in doubt whether, if they should now pay the further duties demanded and cause suit to be instituted for their recovery, it may not be pleaded that the action cannot be maintained upon the ground that the payments were voluntary.

13 You are informed that on the trial of the cases the Department will consent that such plea shall not be made, provided the entire amount of duties demanded by the collector shall be paid before suit is brought against them.

Very respectfully,

H. F. FRENCH,
Assistant Secretary.

(One encl.)

On the first day of October the following answer to the fourth count of the amended declaration was filed:

And now comes the defendant, and for answer to the fourth count of the plaintiffs' declaration as amended says:

That after the first liquidation as set forth in said fourth count, and within one year from the time of the entries therein described, the defendant caused said invoices to be sent to a United States local appraiser for reappraisal; that said appraiser, within a year from the date of said entries, made a new report thereon; that the plaintiffs, upon notice

14 of this report, and within one year from the date of the entries, except by the Parthia of May 6th, 1878, and one day after the expiration of the year in case of the entry by said Parthia, appealed from said report, and requested a reappraisement according to law, a copy of which request is hereto annexed; that a merchant appraiser was thereafter appointed by the defendant to act with the general appraiser in the appraisal

of the merchandise described in said entries within one year from the date of entry, except in case of the said Parthia, in which it was after the expiration of the year; that said board of appraisal held many meetings at which the plaintiffs were present personally and by counsel, said meetings being after the expiration of one year from the date of said entries; that as to the goods in controversy, said board reported that they did not reappraise them for the reason that they could not be found and were not examined by them; that the fees of the merchant appraiser were paid
15 by the plaintiff; that at no time before the final liquidation did the plaintiffs claim that the first liquidation was final and conclusive, or object to the second liquidation or to the reappraisal by the local appraiser, otherwise than by their appeal therefrom as aforesaid, or by the board of reappraisement, or to the power of the defendant to order a reappraisal, though well knowing the facts above set forth; that the second report aforesaid of the local appraiser increased the values of said goods from the invoice values, disallowed a discount of twelve and one-half per centum which appeared on the invoices, and changed the rate of some of the merchandise; that the second liquidation, the subject of this suit, was made by the defendant by the disallowance of said discount and by changing the rate of duty as suggested by the local appraiser as aforesaid.

GEORGE P. SANGER,
U. S. Atty., Defendant's Attorney.

(Copy.)

BOSTON, *May 6th*, 1879.

16 SIR: As we consider the appraisement made by the United States appraisers too high on invoice of dyes imported by A. Poirrier, of Paris, France, in the Parthia, from Liverpool, Eng., entered by us at the custom-house here May 6th, 1878, we have requested that the same may be reappraised pursuant to law, with as little delay as the circumstances of the case will permit.

Respectfully, yours, &c.,

CUSHING, PORTER & CADES,
Consignees.

To Hon. A. W. BEARD,
Collector of the Customs, Boston, Mass.

(The request in each case was the same, with the exception of dates and the name of the steamer by which the importation was made.)

On the said first day of October, the plaintiffs filed the following demurrer:

Now come the plaintiffs, by their attorney, and say that the answer of the defendant to the fourth count of the plaintiffs' declaration, and
17 to the matters therein contained, is not sufficient in law to bar the plaintiffs from having their said action at law against him, and that the plaintiffs are not bound to make any reply, and this they are ready to verify; and for particulars the plaintiffs say that the defendant has set out no sufficient grounds to avoid the final and conclusive effect upon all parties thereto of the first liquidation by said collector made of the several entries in suit.

Wherefor', for want of a sufficient answer to the said count, the plaintiffs pray judgment and their damages.

By their attorney.

CHAS. LEVI WOODBURY.

This cause was thence continued to the present term, when the same is set down for hearing and fully heard upon the demurrer of plaintiffs. On the twenty-first day of February, A. D. 1884, by order of the court, the demurrer of plaintiffs is sustained and the said answer to said fourth count is adjudged bad, and it is ordered that judgment to be entered
18 for the plaintiffs for an amount to be found by an assessor.

On the eleventh day of March it is ordered by the court that John M. Fiske, esquire, be appointed assessor. On the fifth day of April the following amendment to declaration is filed and allowed by consent:

Now comes the plaintiffs in the above-entitled case and move to amend the first and second counts in said declaration by striking out wherever the same occur, in either words or figures, the following, three thousand one hundred and thirty $\frac{05}{100}$, and insert in place thereof the words or figures, as the case may, three thousand two hundred twenty-eight $\frac{10}{100}$, so that the sum declared for may be three thousand two hundred twenty-eight $\frac{10}{100}$ dollars, instead of three thousand one hundred thirty $\frac{105}{00}$ dollars.

And further plaintiffs move to amend the account annexed to said first count as follows, to wit: In item one, by striking out figures 189.90
19 and inserting in place thereof the figures 242.90. In item six, striking out figure' of said item 229.05 and inserting in place thereof the figures 274.10.

C. L. WOODBURY,
Pl'ffs' Attorney.

On the twelfth day of April the following assessor's report is filed:

The undersigned, appointed assessor in the above-entitled action (as per the order of the court, hereto annexed, will more fully appear) to assess the plaintiffs' damages, having attended to said duty, hereby makes his report:

He finds the amount of duties paid, as per final liquidation was..	$5, 385 15
There should have been paid as per original liquidation.....	2, 157 05
Difference collected in excess	3, 228 10
Interest on same, at 6% per annum, from April 21, '82 (date of writ), to March 15, '84 (date of order of court).....	367 74
	$3, 595 84

All of which will more fully appear from the detailed statement annexed.

J. M. FISKE.

[Folios 20, 21.]

Bond No.	Vessel.	Date of importation.	Importers.	Marks.	Numbers.
1868.....	Batavia.	July 1st, 1878	Cushing, Porter & Cades.	AP P	71662.
1276.....	"	Aug. 5th, "	.....do.....	AP AP P B	55984, 12523, 55983, 12521, 12522.
Duty paid.	"	" "	.....do.....	" "	12524–12525.
1517.....	Siberia.	Sept. 17th, "	.....do.....	AP B	39143–39150.
Duty paid	"	" "	.....do.....	AP AP B P	39139–42, 39151–2, 51419–20.
836.....	Atlas...	May 20th, "	.....do.....	AP B	44705–8, 44689–91.
Duty paid	"	" "	.....do.....	AP AP P B	55732–35, 44692–98.
845.....	Batavia.	May 27th, "	.....do.....	AP B	44613, 44614, 44616, 44617, 93135–7, 44611–12.
Duty paid	"	" "	.....do.....	AP AP AP AP B N P C	44615, 89712–15, 71427–29.
923.....	Siberia.	June 5th, "	... do.....	AP AP B P	44790, 55776–78.
Duty paid.	"	" "	.....do.....	AP B	44791.
772.....	Partha..	May 6th, "	.....do.....	"	44464–66.
Duty paid.	"	" "	.....do.....	AP AP N B	89681–2, 44463.

Description of merchandise.	Original liquidation at 20 % as entered.	Final liquidation at 50c. & 35 %, and 20 % add'l under sec. 2900, R. S.		Amount of duties paid as assessed in final liquidation.	Difference between the original and final liquidation.
Roccelline	17 40	Regular	$60 00	$80 00	$62 60
		Sec. 2900, R. S.,	20 00		
Aniline	91 70	Regular	99 75	136 75	45 05
		Sec. 2900, R. S.,	37 00		
Do	210 00	Regular	324 85	439 05	229 05
		Sec. 2900, R. S.,	114 20		
Roccelline & orange	119 60	Regular	438 70	575 10	455 50
		Sec. 2900, R. S.,	136 40		
Aniline	185 80	Regular	435 55	570 15	384 35
		Sec. 2900, R. S.,	134 60		
Aniline orange dyes	358 50	Regular	536 35	728 55	370 05
		Sec. 2900, R. S.,	192 20		
Do	528 20	Regular	586 25	771 25	243 05
		Sec. 2900, R. S.,	185 00		
Lutecimine	80 80	Regular	237 05	329 65	248 85
		Sec. 2900, R. S.,	92 60		
Various	373 85	Regular	792 95	1,074 35	700 50
		Sec. 2900, R. S.,	281 40		
Anilines	39 40	Regular	178 40	223 20	183 80
		Sec. 2900, R. S.,	44 80		
Roccelline	17 60	Regular	60 00	80 00	62 40
		Sec. 2900, R. S.,	20 00		
Orange & anilin	74 60	Regular	81 40	127 60	53 00
		Sec. 2900, R. S.,	46 20		
Lutecimine & roccelline	59 60	Regular	181 50	249 50	189 90
		Sec. 2900, R. S.,	60 00		
	$2,157 05		5,385 15	5,385 15	$3,228 10
1 year and 328 days' interest, @ 6% on $3,228.10, to wit, from (date of writ) April 21st, 1882, to (date of order of court) March 15th, 1884					367 74
					$3,595 84

It is thereupon, to wit, April 12, 1884, considered by the court that the said Thomas C. Porter, W. H. Cades, and S. H. Austin, plaintiffs, recover of the said Alanson W. Beard, defendant, the sum of three thousand two hundred and twenty-eight dollars and ten cents, being the amount of duties collected in excess, and interest thereon from April 21, 1882, the date

of the writ, to April 12, 1884, amounting to the sum of three hundred and eighty dollars and fifty-three cents, and their costs of suit taxed at .

A true record.

Attest:

JOHN G. STETSON,
Clerk.

22 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings in the cause of Thomas C. Porter et al. v. Alanson W. Beard in said circuit court determined.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court at Boston, in said district, this thirtieth day of September, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[SEAL.] JOHN G. STETSON,
Clerk.

(Indorsement on cover:) No. 418. Alanson W. Beard, collector of customs, plaintiff in error, vs. Thomas C. Porter, W. H. Cades, and S. H. Austin, late copartners doing business under the firm-name of Cushing, Porter & Cades. Massachusetts C. C. U. S. Filed 18th October, 1884.

2605——2

124-437

In the Supreme Court of the United States

OCTOBER TERM, 1887.

ALANSON W. BELLAR, collector of customs, plaintiff in error,
vs.
THOMAS C. PORTER, W. H. CARR, and S. H. AUSTIN, late copartners, doing business under the firm name of Cushing, Porter & Carr. } No. 134.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE PLAINTIFF.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

ALANSON W. BEARD, COLLECTOR of customs, plaintiff in error,
vs.
THOMAS C. PORTER, W. H. CADES, and S. H. Austin, late copartners, doing business under the firm-name of Cushing, Porter & Cades. } No. 134.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE PLAINTIFF.

STATEMENT OF CASE.

On the 21st of April, 1882, the plaintiffs brought suit in the circuit court of the United States for the district of Massachusetts against Alanson W. Beard, collector, to recover duties which they claimed were illegally collected on six different importations of merchandise entered

at six several dates, the first entry being made on the 6th of May, 1878, and the last on the 17th of September, 1878. The declaration in the case consists of counts in usual form, with specification of items in the first count, claiming to recover $3,130.05. To these counts the defendant filed a general denial. On the 13th of September, 1883, the plaintiff amended the pleadings by adding a fourth count, in which t he material allegations are: The importation of the goods and liquidation by the invoices; payment of the duties on the liquidation and delivery of the goods; a reliquidation after a lapse of more than one year, which increased the duties $3,030.05; protest, payment of the additional duties, appeal to the Secretary of the Treasury, affirmance of the reliquidation, and that the Government agreed to waive the defense of voluntary payment. The same day the answer of the defendant was filed, alleging that after the first liquidation, within a year from the time of the entries, the defendant caused the invoices to be sent to a local appraiser for reappraisement, who, within a year from the date of entry, made report thereon; that within a year as to all invoices except one imported on the *Parthia* (and on that entry one day after one year), plaintiffs requested reappraisement; that a merchant appraiser was appointed to act with the general appraiser within one year from entry, except as to the one entry; that the board of reappraisers held many meetings after the expiration of the year, at which plaintiffs appeared repeatedly, personally, and by counsel, and were heard; that the reappraisers reported they did not reappraise, because the goods could not be found and examined by them; that the fees of the merchant appraiser

were paid by the plaintiffs; that at no time before final liquidation did the plaintiffs claim that the first liquidation was final, or object to the final liquidation, or to the reappraisal, otherwise than, after the final liquidation, by protest and appeal; nor did they object to the board of reappraisement, or deny the power of the defendant to order the reappraisal; that the local appraiser disallowed a discount from the invoice values of 12½ per cent., changed the rate of some of the merchandise and increased its value; that the final liquidation by the collector, which is the subject of this suit, was made by the defendant's disallowance of the discount and by changing the rate of duty, as suggested by the local appraiser. The plaintiffs demurred to the answer, and claimed that the first appraisement was final and conclusive.

Fourth count.

And the plaintiffs further say that on the several respective dates, and by the vessels named in the account annexed in the first count of said declaration, they imported and entered at the custom-house, in said Boston, the goods described in the several items of said account annexed, and the defendant duly liquidated the duties on said goods, and the plaintiffs paid the same, and the said defendant then and there delivered to the plaintiffs all of the said goods.

And the plaintiffs say that long afterwards, and after the lapse of more than one year from said respective dates of entry, the defendant made a new liquidation and settlement of duties upon said goods entered as aforesaid, and demanded of the plaintiffs the full sum of $3,030.05

as additional duties upon said goods so entered as aforesaid. And the plaintiffs say that they protested against such second liquidation and settlement of duties, and protested against the payment of said sum, and alleged in said protest, and now allege, that said second liquidation was made after the payment of the duties as first ascertained, and after the goods had been delivered to the plaintiffs, and more than one year after said several dates of entry and the same was and is illegal and void. Plaintiffs appealed to the Secretary of the Treasury, who decided thereon, affirming the action of the defendant.

And the plaintiffs further say that they denied, by said protest and appeal, the right of the Government and of this defendant to make such second liquidation and demand, and doubts having arisen as to the right of the plaintiffs to recover back the same if paid, should the defendant contest the same, upon the ground that such payment was voluntary, the plaintiffs, by their attorney, addressed a letter to the Secretary of the Treasury of the United States, a copy of which is hereto annexed, marked A, and received in reply thereto a letter from said Secretary, a copy of which is hereto annexed, marked B, and said Secretary also addressed a letter to the United States attorney for said district, a copy whereof is hereto annexed, marked C, which was exhibited to the plaintiffs' attorney before the payment by the plaintiffs to defendant of the sum demanded upon said second liquidation. And the plaintiffs say that, relying upon the said agreement and assurance of the Secretary of the Treasury that the question of voluntary payment should not be raised or set up in any manner as a defense to a suit by the

plaintiffs to recover back said sum, the plaintiffs were induced to and did pay the said defendant, under protest and appeal, the said sum of three thousand thirty dollars and five cents ($3,030.05) illegally ascertained and demanded as aforesaid, the same being the full sum demanded by the defendant, and the defendant now owes the plaintiffs the said sum, with interest thereon.

CHAS. LEVI WOODBURY,
Attorney for Plaintiffs.

ANSWER.

And now comes the defendant, and for answer to the fourth count of the plaintiffs' declaration as amended, says:

That after the first liquidation as set forth in said fourth count, and within one year from the time of the entries therein described, the defendant caused said invoices to be sent to a United States local appraiser for reappraisal; that said appraiser, within a year from the date of said entries, made a new report thereon; that the plaintiffs, upon notice of this report, and within one year from the date of the entries, except by the *Parthia* of May 6, 1878, and one day after the expiration of the year in case of the entry by said *Parthia*, appealed from said report, and requested a reappraisement according to law, a copy of which request is hereto annexed; that a merchant appraiser was thereafter appointed by the defendant to act with the general appraiser in the appraisal of the merchandise described in said entries within one year from the date of entry, except in the case of the said *Parthia*, in which it was after

the expiration of the year; that said board of appraisal held many meetings at which the plaintiffs were present personally and by counsel, said meetings being after the expiration of one year from the date of said entry; that as to the goods in controversy, said board reported that they did not reappraise them for the reason that they could not be found and were not examined by them; that the fees of the merchant appraiser were paid by the plaintiff; that at no time before the final liquidation did the plaintiffs claim that the first liquidation was final and conclusive, or object to the second liquidation or to the reappraisal by the local appraiser, otherwise than by their appeal therefrom as aforesaid, or by the board of reappraisement, or to the power of the defendant to order a reappraisal, though well knowing the facts above set forth; that the second report aforesaid of the local appraiser increased the values of said goods from the invoice values, disallowed a discount of 12½ per centum, which appeared on the invoices, and changed the rate of some of the merchandise; that the second liquidation, the subject of this suit, was made by the defendant by the disallowance of said discount and by changing the rate of duty as suggested by the local appraiser as aforesaid.

GEORGE P. SANGER,
U. S. Attorney, Defendant's Attorney.

DEMURRER.

Now come the plaintiffs, by their attorney, and say that the answer of the defendant to the fourth count of the

plaintiffs' declaration, and to the matters therein contained, is not sufficient in law to bar the plaintiffs from having their said action at law against him, and that the plaintiffs are not bound to make any reply, and this they are ready to verify; and for particulars the plaintiffs say that the defendant has set out no sufficient grounds to avoid the final and conclusive effect upon all parties thereto of the first liquidation by said collector made of the several entries in suit.

Wherefore, for want of a sufficient answer to the said count, the plaintiffs pray judgment and their damages.

By their attorney.

CHAS. LEVI WOODBURY.

EXCEPTION.

The court erred in entering judgment in favor of the plaintiff and against the defendant on the demurrer.

BRIEF OF ARGUMENT.

The substantial question involved in this case arises under the limitation on the liquidation of duties prescribed by the twenty-first section of the act of the 22d of June, 1874 (18 U. S. Stat., 190), which provides:

> That whenever any goods, wares, and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, and such goods, wares, and merchandise shall have

been delivered to the owner, importer, agent, or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud, and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties.

The plaintiffs, by the pleadings, claim under this section that they may contest with the Government the reliquidation both before and after the expiration of one year from the date of entry through all the possible steps, including protest, to the final decision of the Secretary of the Treasury, and after that set up the statute of limitation as a defense in an action brought by the Government to recover the duties. On the part of the Government this is denied, and it is claimed the limitation of the statute set up by the demurrer is not a sufficient reply under the facts stated in the pleadings.

FIRST.

Statutes of limitation cease to run from the first legal step taken in a proceeding which is the subject of that limitation which results in the determination of the right. The actual reappraisement by the local appraiser in this case was the first step in a continuous legal proceeding which terminated in the decision of the Secretary. The application for the reappraisement was the second. The first was the act of the Government. The second the act of the importer in the proceeding instituted. Both of these were done before one year had expired from the date of entry. After the expiration of the year the contest begun before was continued. The plaintiffs, by counsel and

personally, participated in and contested for what they claimed to be their rights in the contest, until after the collector had decided the subject in dispute against them. No right of defense or benefit was claimed from the limitation now asserted until after the liquidation by the collector. This defense was first set up in the protest. The Secretary, on the hearing of appeals in custom cases, by the law is intended to act only as an appellate tribunal, with no original jurisdiction. The protest filed against the action of the collector is closely analogous to the assignment of error required in appellate courts. A defense not jurisdictional, if not claimed or set up at some period in the proceeding before the collector's final liquidation, should be regarded as waived. It would be inequity to allow the importer to take all the chances for gain, and subject the Government to the inconvenience, waste of time, and expense incident to a protracted contest over an appraisement, and then, after the contest should have been decided against him, protest, and have the Secretary of the Treasury act upon that which was never submitted to the collector when the case was passed upon by him.

SECOND.

The inequity suggested in the last paragraph was doubtless had in view by the legislative power in the passage of the act of limitation relied upon by the plaintiffs in error in this case, for the act expressly provides that the limitation shall only apply in the absence of fraud and "*in the absence of protest.*" In this case there was a protest filed. Its nature and character are not fully set out in the pleading, but that a protest was filed is clearly

stated. If it should be replied, a protest was indispensable to secure an appeal to the Secretary, the response may be made. The statute gives the importer the option of claiming the benefit of the statute as a limitation, or to waive it, and take his appeal to the Secretary; but it denies him the right to do both. If he elects to waive the the statute by protesting, he is no worse off than he would have been if the act had not been passed. If the statute is a valid defense applicable to his case, and he desires to take the benefit of it, he may have his advantage before the collector; or when, as in this case, the goods have been delivered to him, he may decline to pay if collection is attempted by suit. He may offer in evidence the first liquidation, which the statute declares shall "be final and conclusive upon all parties" as a bar to recovery.

(3) This suit was brought on the 21st day of April, 1882. It does not appear in the pleading at what date the Secretary of the Treasury affirmed the action of the collector. Section 2931, Revised Statutes, provides the decision of the Secretary shall be final unless suit be brought within ninety days after the decision of the Secretary. This is a condition precedent to entitle the plaintiffs to recover in any case. That this condition has been performed it is claimed must appear affirmatively either in the pleadings or the evidence. On demurrer the court should review the whole record, and if the plaintiff has not set forth grounds sufficient to sustain a recovery, notwithstanding the answer might be defective, judgment should be entered in favor of the defendant.

G. A. JENKS,
Solicitor-General.

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Supreme Court of the United States.

OCTOBER TERM, 1887.

NO. 134.

ALANSON W. BEARD, COLLECTOR OF CUSTOMS,
Plaintiff in Error,
v.
THOS. C. PORTER, W. H. CADES *and* S. H. AUSTIN, *late Copartners doing business under the firm name of* CUSHING, PORTER & CADES.

BRIEF FOR THE DEFENDANTS.

BRIEF.

There is no denial by the plaintiff in error that the facts specified in § 21, Act 1874, as needful for a conclusive settlement between the parties, existed in connection with the first liquidation of the import entry, viz.: an entry, a liquidation, payment of the duties thus liquidated without protest, and a delivery of the import to the importer. A subsequent reliquidation was made by the collector more than a year from the date of the entry.

Despite these admissions of fact, the plaintiff in error vainly contended in the court below that as collector he had a jurisdiction to reliquidate the duties on the import after the facts had arisen which § 21 includes as the terms of a final conclusive settlement, upon both parties.

Considering first, the question of powers or jurisdiction of a collector.

The Act of 1799, § 49, gave him and the naval officer power to estimate, and after to liquidate the entry and cause the duties to be paid or secured to be paid.

The Act of 1864, R. S. § 2,931, was the first that gave any legal effect to his decision on the question of class or duty rate or dutiable value in the liquidation. This section made his decision conclusive on the *importer* unless appealed from; prior to that statute the importer's opinion on these points was as binding as the collector's. The courts determined their differences, when invoked by suits for debt against the importer; or through the coercive power of the collector on the import. "The power of seizure" was always the collector's, and through this coercion he obtained the bond, or the payment he desired, acting at his peril.

This power of coercion under the system of cash duties must exist as long as he has power to make a reliquidation, but remedial subsequent measures are provided for the injured importer.

The collector's *decision* first had legal effect by the Act of 1857; then a wider effect in the Act of 1864, now R. S. § 2,931. By this section he has become a special tribunal on certain subjects; as such, the limits of his jurisdiction are to be found in § 2,931, and the § 21 of Act of 1874. The doctrine of the power of such tribunal under this statute is well stated by Judge Brown in *U. S.* v. *Leng*, 18 Fed. Rep. 16, p. 24, "such tribunals having rendered their decision, become *functus officii*, and cannot recall or reverse their decision."

The liquidation by the collector is the decision, the ascertainment of the duties, the pivot around which revolves the whole system of protest and appeal and payment of § 2,931.

Its quality in law as a judgment attached in 1864; previously, it was a mere claim attended by a coercive right to attach or seize the *rem*, the import, and oust the owner till he settled. Replevin lay not against the seizure.

In 1864, his decision, unprotested and not appealed from, became *law*, when the importer paid. Lawrence *v.* Caswell, 13 Howd, p. 436, and when he did not pay the demand.

Westray *v.* U. S. 18 Wal. 322.

The courts held though this decision under § 2,931, was final against the importer, it was not final against the United States, and *reliquidations* were sanctioned.

U. S. *v.* Watts, 15 Blatchf. 30.
U. S. *v.* Phelps, 17 Blatchf. 312.
U. S. *v.* Leng, 18 Fed. Rep. 16.

Reliquidation.

The Act of 1842 first required duties to be paid in cash, thus superseding the earlier laws, which required the duties to be paid, or *secured to be paid;* § 12 provided thatp ossession should be retaken on liquidation, if there was any failure or neglect to pay the duties. See now § 2,964 to the same effect. As cash duties had become the exclusive policy, this declaration of the collector's duty to keep or retake the goods, till he got the money which his liquidation called for, or until an appellate power overruled him, was the logical necessity of the system.

The legal right to make reliquidations on the discovery that short duties or no duties had been paid, is recognized by the decisions previously cited, and by Rev. Stat. § 3,012½, and by the Act of 1874, § 21, laws of that year, p. 190, for a limited period of time.

There was a crying evil prior to 1874, of systematic reliquidations, began long after the settlement under the first liquidation and receipt of the import by the consignee, after, also, he had settled his own accounts with his consignor and disposed of the goods in good faith, it was uprooting the security of commerce. Moieties were too attractive. Congress listened to the complaints, and the Act of 1874 was the result, — reliquidations were limited in point of time. "The settlement and delivery, which both parties had treated as fair and just, when made, was declared to be conclusive after a year from the entry."

From 1864 the ascertainment of duties has revolved on the liquidation. Its new *quasi* judicial character superseded other details of entry, etc. The Act of 1874, § 21, limits the authority of the United States to disturb a liquidation of duties by reliquidation, and establishes a time limit to the collector's power to assess.

His term of court is over, his control of the judgment is at an end, on the expiration of a year after the date of entry; provided the liquidation, payment and delivery of the import had taken place in the absence of protest and without fraud.

U. S. *v.* Leng, 18 Fed. Rep. 16.
U. S. *v.* Phelps, 17 Blatchf. 312.
U. S. *v.* Frazer, 10 Benedict.
U. S. *v.* Seidenburg, 17 Fed. Rep. 229.

He is *functus officii* as to that import as truly as if it had been settled fifty years before.

The fraud of the importer only would reopen a jurisdiction to reliquidate.

Plaintiff contends that orders to the appraiser to reappraise the import, given within the year after entry, will *per se* bar the running of the Act of 1874, § 21.

His brief cites no case to support this position. It is called by him a statute of limitations. This court has said, in

U. S. *v.* Wilder, 13 Wal. 255,

that statutes of limitation are entitled to the same respect as other statutes.

In Bill *v.* Morrison, 1 Peters, 360, "that it is a statute of repose, a wise and beneficial law. It has a manifest tendency to produce speedy settlement of accounts," etc.

Ordinarily, such a statute is a prescription against suing on old claims, not reacknowledged.

Defendant in error contends that § 21 has the nature of a statute of jurisdiction limiting the powers of the collector, given him by § 2,931, and those powers implied to him by previous usage, of reliquidating. Possibly, also, it may act as a statute of limitations in certain aspects.

The collector never formulated this claim whilst his right to formulate existed, he was *functus officio* as to that importation when he did. It had been settled under § 21, 1874, finally. He had no judicial discretion left to liquidate, nor right to use the coercive powers of the revenue laws on the import. The plaintiff argues, that "a defence not jurisdictional, if not claimed or set up at some period in the proceeding before the collector's final liquidation, should be regarded as waived" (p. 9).

I contend the Rev. Stat. § 2,931, directs such defences to be made by *protest after liquidation;* and the defendant followed the statute.

U. S. *v.* Watts, 15 Blatchf. p. 32, is to the same effect.

We also have a jurisdictional defence. The plaintiff contends his order for reappraisement, made within a year from entry, should vacate the statute, and extend the jurisdiction

of the collector beyond the period named in the statute to make a reliquidation.

The statute neither declares nor implies this. The first liquidation stands until a new one is made. If an order to reappraise suspended or vacated the § 21 settlement, the order might stand for a century before anything should be done, and the liquidation of record and the settlement go for nothing all the time. The *liquidation* of the collector includes decisions on class and rate of duty of which by law he is sole judge, as well as the market value which a valid appraisement alone determines. A reliquidation is not dependent necessarily on an appraisal of value.

The answer alleges that the appraiser after liquidation, and within a year, made a new report to the collector at his request, and that the importer on notice promptly appealed to merchant appraisers. This appeal was our lawful right against the act of a local appraiser. It does not follow logically that the result of a reappraisal necessarily is to report an increase in the dutiable value, either when made by the local appraiser or on appeal by the merchant appraisers, the judicial umpires. It cannot be inferred that a new liquidation will follow such an order. The report may confirm the existing appraisal.

The appeal to merchant appraisers vacated the second report of the local appraiser, § 2,930, and they became the Board of Appraisement.

Rankin *v.* Hoyt, 4 Howd, 327.
Greely *v.* Thompson, 10 Howd, p. 241.

The Record, p. 6, fol. 14, states that this board held many meetings after a year from the entries, and reported still after these meetings to the collector that they had done *nothing*.

Later than this, the collector attempts to resume the lost function of an assessor once his, and to set aside *the settlement* which made his first liquidation final and conclusive on all parties. He disallows the discount of twelve per cent! He changes the rate of duty! The latter act is, § 2,931, a function of his own office, which does not depend on the appraisement or the appraisers.

The statutes, which once gave him a jurisdiction on rate of duty, had also terminated it, before he reliquidated.

It is strange that the efforts of the importer to protect his own right against the influences opposed to him should be held up as concessions or admissions of the legality of proceedings, when plaintiff's brief, p. 9, admits that the importers "contested for what they claimed to be their rights in the contest, until after the collector had decided the subject in dispute against them"; § 2,931, and existing decisions under it, make the remedy for illegal exaction depend on a contest in all these stages waged by the importer.

Lawrence *v.* Caswell, 13 Howd, p. 496.

We contend that the collector had no authority at law to make the liquidation he relies on.

That the settlement of duties was final and conclusive before he made this reliquidation, and cannot be impared by it.

"The Absence of Protest."

Plaintiff in error contends that there is a protest which prevents the twenty-first section from running in this case.

Section twenty-one defines what shall constitute a final settlement of duties; a liquidation, payment and delivery, in the absence of protest or of fraud, shall be conclusive one year after entry.

That is, there shall have been no protest against the liquidation which the statute proposes to declare final and conclusive, when it has stood a year.

In fact no protest was filed against that liquidation which we rely on. Both parties stood by it for a year from the entry.

A protest was filed against the illegal assessment of the collector made after his lawful jurisdiction had expired, and § 2,931 required it. See U. S. *v.* Schleisinger, 120 U. S., to prevent the collector's decision from being final and conclusive on the importer.

Plaintiff's argument is that if we protest and appeal against the jurisdiction of the collector to make a new liquidation, after a final settlement arises under § 21, 1874, we thereby admit he has such jurisdiction, waive the objection, and cannot afterwards dispute it in a court of law, either as plaintiff or defendant.

The protest laws of the United States are construed by the courts that all which is not protested against is admitted.

We did protest to the collector his want of jurisdiction, and he did not assent to our view; then we appealed, and the Secretary of Treasury sustained his view that *the lien* had not been extinguished.

The powers of coercion by seizure of our import were set in force by this decision sustaining the last liquidation, as well as by an action *in personam*.

We corresponded with the Secretary, and took the course which he pointed out, and became plaintiff. The United States has our money against our consent, and we want it returned to us.

The plaintiff mistakes the relations which the words "in the absence of protest" bear to the § 21 in which they occur. The settlement of duties on the first liquidation is

final and conclusive, and we are entitled to recover in this action.

Plaintiff further objects that it does not appear in the record that the suit was brought within ninety days after the decision of the Secretary.

Rev. Stats. § 3,012, require that this shall be stated in the bill of particulars, and that appears to have been followed.

In the usual practice of the Circuit Courts of this circuit, this fact is proved in testimony, and never is inserted in the declaration. It is not a question of bringing the suit, *but of maintaining* it when brought.

Nor is this an error assigned in the writ of error or in the bill of exceptions. This is the collector's appeal, and not ours. If he doubted below on this point, why did he not take an exception?

The judgment of the court below ought to be sustained.

All which is respectfully submitted.

CHAS. LEVI WOODBURY,
Counsel for Defendants in Error.